IN THE

Supreme Court of the United States

October Term, 1961

No.....

THOMAS EISTRAT,

Petitioner,

vs.

NORTHERN LUMBER COMPANY, a partnership composed of Charles V. Clawson and Don Clawson; CHARLES V. CLAWSON, DON CLAWSON,

Defendants and Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California

THOMAS EISTRAT
1020 S. Almansor Street
Alhambra, California
In Propria Persona.

LONG BEACH REPORTER

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To the Honorable Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Thomas Eistrat, prays that a Writ of Certiorari issue to review the decision of the District Court of Appeal of the State of California, Second Appellate District, Division One, entered in the above-entitled case on March 20, 1961.

Citations to Opinions Below

The judgment and orders of the trial court are unreported and are included in the Certified Record. The decision of the State District Court of Appeal is printed in Appendix B. hereto, and is reported in 190 A.C.A. 326, 12 Cal. Rptr. 194.

Jurisdiction

The decision of the District Court of Appeal of the State of California was entered on March 20, 1961 (Cert. Rec., Appx. B, infra). Petition for Rehearing was denied on April 6, 1961 (Cert. Rec.). Petition for Hearing, After Decision of the District Court of Appeal, was denied by the Supreme Court of the State of California on May 16, 1961 (Cert. Rec.).

The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257(3) (since a right is claimed under the Fourteenth Amendment of the Constitution of the United States).

Questions Presented for Review

1. Whether there has been discrimination against the federal courts and petitioner where there has been deprivation of property in contravention to the 14th Amendment of the United States Constitution, and where the state trial court received in evidence final orders of the federal court in bankruptcy adjudicating title to the property in petitioner—and then the state courts permit attack to repudiate and nullify that federal judgment?

2. Whether it is a denial of petitioner's rights under the XIVth Amendment of the United States Constitution for the highest California state court

in which appeal could be had to hold that a final bankruptcy court order in evidence *is not*, in respect to the matter directly adjudged, conclusive between the parties *and their successors in interest* by title subsequent to the commencement of the action, litigating for the same thing under the same title and in the same capacity, with actual or constructive notice of the pendency of the bankruptcy proceeding?

Constitutional Provisions and Statutes Involved

Art. I, Sec. 8, sub. 4; Art. III, Sec. 2; Art. IV; Art. VI of the United States Constitution and Amendment XIV thereto U.S.C. 1946 Sec. 1(10), Chap. 1. Title 11; and Sec. 11(a), Chap. 2, Title 11, Bankruptcy Act; and California Code of Civil Procedure, Sec. 1908. They are printed in Appendix A, hereto.

Statement of the Case

The Facts

This case is from a judgment for respondents during which only the issue of liability was tried in regard to the conversion of lumber taken from petitioner's property in 1951 during one Jones' bankruptcy proceeding. Respondents have only claimed rights to the lumber as flowing through the Jones bankruptcy proceeding.

It is admitted in evidence herein that:

> "Neither plaintiff or Elma Eistrat gave defendants written or other permission to acquire or purchase said timber or lumber."
>
> Page 2, C.V. Clawson affidavit, Exhibits 2 and 3 in evidence, RT 45: 10 to 46; 13; appellant's reply brief, pp. 1, 2.

Petitioner also on July 2, 1949 gave defendants written notice they would be held liable for conversion before they took any lumber (Exh. #1, RT 26, 19-24)

The trial court in this case found defendants took about 161,000 board feet of lumber from plaintiff's land during the Jones bankruptcy proceedings in July and August 1951 (CT 45: 17 to 46: 8; 104: 4-12). The trial court herein also found that defendants refused to deliver said lumber to plaintiff or to pay him, although he demanded such before commencement of this action (CT 44: 31-32; 45: 6-9).

The case was determined principally upon the question of title to the lumber.

In support of petitioner's claim to title to the lumber, the trial court received in evidence certified documents from the federal court showing adjudication of title in petitioner. These documents were: (1) Pltf's Exh. 5, being his petition in the bankruptcy court filed on September 29, 1949 claiming title to the logs, lumber and timber on his property on June 24, 1949 (the time of the filing of the Jones bankruptcy proceeding) and thereafter, (2) Pltf's Exh. 7, being the final order entered by the bankruptcy court thereon on October 1, 1951 granting the petition, and (3) Pltf's Exh. 6, being the findings of fact and conclusions of law in support of said federal judgment.

In support of the correct meaning of that federal judgment, petitioner also urged the reiteration of the meaning by the same Federal Judge, Honorable C. E. Beaumont, twenty-six months later in granting plaintiff judgment against the Massachusetts Bonding Company for cost of removal of a sawdust pile. By

order entered February 3, 1954 in said Jones bankruptcy proceedings it was held:

> "The claimants having prevailed in their petition to reclaim property as by decree and order of the court entered on October 1, 1951 decreeing that the bankrupt had no right, title or interest in or to the property described in said petition to reclaim property." (CT 56:20 to 57:3)

The state court permitted an attack upon said final federal judgment of October 1, 1951; and held contrary to the holding of the federal court in holding that adjudication by the federal court was for the *defendants*. In this connection the reported opinion and judgment of the District Court of Appeal states:

> "Plaintiff petitioned the court in the bankruptcy proceeding on September 29, 1949, to reclaim the property, and findings and an order dated October 21, 1950, were made with reference thereto. A petition to review that order was filed by plaintiff and an order was so made and a final judgment therein was made in about October 1951. Judgment in this case was for the defendants." (190 A.C.A. 326, 329) (Appendix "B", attached hereto)

The correct holding of the federal court granting the petition to reclaim in favor of petitioner herein was raised at every opportunity in the trial court (CT 71: 17 to 72: 13; 56: 4 to 58: 25); and in the lower appellate court in opening brief (pp. 3, 4, 7-10, 13); again in appellant's reply brief (pp. 6-11); again in petition for rehearing (pp. 7-9, 11); again in petition for rehearing by letter of April 7, 1961, copy at-

tached to petition for hearing in California State Supreme Court as Appendix "A", therein; and in petition for hearing in the Supreme Court (p. 3, and Appendix "A").

In said Appendix "A" petitioner also quoted from previous reported cases in which he was plaintiff (50 Cal. 2d 289; 181 ACA 69; 164 CA 2d 374; and 124 CA 2d 42) the previous statements of the California courts that the October 1951 federal judgment granted the petition to reclaim in favor of petitioner, and *not for the defendants.*

It can be said with candor that the reported opinion of the District Court of Appeal herein (App. "B") is a wrong that substantially mis-states the facts of the case, the federal judgment, the record in evidence, and the applicable law in substantial violation of petitioner's rights in contravention of the 14th Amendment of the United States Constitution.

The District Court of Appeal judgment is an attack repudiating and nullifying this final federal judgment by rehashing and erroneously stating matters out of context settled by the final federal judgment.

At every stage of the case in the courts below petitioner urged that respondents were conclusively bound by the federal judgment; and that denial by the state courts to give effect thereto in this case was a substantial violation of petitioner's rights in contravention of the 14th Amendment of the United States Constitution.

The Presentation of the Federal Question

The question of respondents being conclusively

bound by the federal judgment was raised before judgment in the trial court (CT 78: 3 to 79: 4); on motion for new trial (CT 62: 30 to 66: 23); in the District Court of Appeal in appellant's opening brief (pp. 8-10), his reply brief (pp. 4, 11, 14-16); his petition for rehearing (pp. 7-10, 14); his petition for hearing in the Supreme Court of California (pp. 2, 3, 7, 8).

The substantial violation of petitioner's rights in contravention of the 14th Amendment of the United States Constitution was also raised in the trial court on motion for new trial (CT 72: 15-22); in the District Court of Appeal in appellant's opening brief (pp. 6-7); in petition for rehearing by letter of April 7, 1961 (p. 4, 5-), copy attached to petition for hearing in Supreme Court as App. "A"; and in his petition for hearing in the Supreme Court of California (pp. 2, 3, 7, App. "A"—4)

The authority of the following cases was cited to the California State Supreme Court: *Acme Harvester Co. v. Beekman Lumber*, 222 U. S. 300; *Ex parte Baldwin*, 291 U. S. 610; *Hebert v. Crawford*, 228 U. S. 204; *May v. Henderson*, 268 U. S. 111; and *Whitney v. Wenman*, 198 U. S. 539.

Reasons for Granting the Writ

This court has stated in *Baltimore & Ohio Ry. Co. v. United States*, 298 U. S. 349, 366 that:

> "The equal protection of the laws which by the Fourteenth Amendment, no state can deny to the individual, forbids — the property of one individual — wrested from him for the benefit of another."

This court has heretofore required that effect be given in state courts to a plea of *res adjudicata* arising from a final decree of bankruptcy court (*Heiser v. Woodruff*, 327 U. S. 726, 733; *Stoll v. Gottlieb*, 305 U. S. 165; *Chicot County Dist. v. Bank*, 308 U. S. 371)

This court has also stated in *Stoll v. Gottlieb*, 305 U. S. 165, that a failure of a state court to give full faith and credit to a bankruptcy court judgment raises a federal question and confers jurisdiction upon the United States Supreme Court.

This court has stated in *Ex parte Baldwin*, 291 U. S. 610, that:

> "Upon the filing of a petition in bankruptcy the bankruptcy court acquires exclusive jurisdiction over the bankrupt and his estate . . ."

This court has also stated that it is also the established rule that jurisdiction once attaching is not lost by the fact that later on possession of the property passes to strangers without order of the court and while the bankruptcy proceeding is still active. That it is immaterial whether the change of possession has come about through voluntary transfer by the bankrupt or his agents, seizure by officers of the state courts, or unauthorized surrenders by officers of the bankruptcy court; that the jurisdiction continues and that the filing of the bankruptcy petition has the effect of an attachment and injunction, and the property is in *custodia legis* (*Whitney v. Wenman*, 198 U. S. 539; *Acme Harvester Co. v. Beekman Lumber*, 222 U. S. 300; *Hebert v. Crawford*, 228 U. S. 204; *May v. Henderson*, 268 U. S. 111).

Respondents only defense to this action for con-

version was the purported rights arising out of his dealings with Jones during the bankruptcy proceeding, having taken the lumber after commencement thereof with notice of petitioner's adverse claims.

> It was admitted and proven in evidence herein that "Neither plaintiff or Elma Eistrat gave defendants written or other permission to acquire said timber or lumber." (citation, supra)

The federal court in bankruptcy having by final judgment entered October 1, 1951 decreed in favor of petitioner that:

> "The claimants having prevailed in their petition to reclaim property as by decree and order of the court entered on October 1, 1951 decreeing that the bankrupt had no right, title or interest in or to the property described in said petition to reclaim property." (CT 56: 20 to 57: 3);

and said judgment having been received in evidence herein (Pltf's Exh. 5 and 6); and petitioner having urged that the state courts herein were conclusively bound thereby; and petitioner having urged in the state courts below that attack, repudiation and nullification of said federal judgment is in contravention of substantial rights of petitioner guaranteed to him under the 14th Amendment of the United States Constitution; it is respectfully submitted that there is good reason for writ of certiorari to be granted by the United States Supreme Court.

Conclusion

It is respectfully submitted that no state should be allowed to discriminate against a United States citizen

by collaterally attacking and repudiating a final federal judgment within the federal court's jurisdiction, thereby wresting his property from him in contravention of the 14th Amendment of the United States Constitution.

Respectfully submitted,

THOMAS EISTRAT

Petitioner

August 4, 1961

APPENDIX "A"

Constitutional and Statutory Provisions.

APPENDIX "A"

Constitutional Provisions and Statutes Which the Case Involves.

I

Article IV, of the Constitution of the United States, which reads as follows:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

II

That portion of Article VI of the Constitution of the United States which reads as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

III

Article XIV, of the Amendments to the Constitution of the United States, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

IV

Article I, Sec. 8, Sub. sec. Fourth of the Constitution of the United States:

"To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States."

V

Article III, Sec. 2, of the Constitution of the United States:

"The judicial power shall extend to all cases in laws and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . ."

VI

U. S. C. 1946, Sec. 1 (10), Chap. 1, Title 11, Bankruptcy Act:

" 'Courts of bankruptcy' shall include the district courts of the United States and of the territories and possessions to which this title is or may hereafter be applicable and the District Court of the United States for the District of Columbia;"

VII

U. S. C. 1946, Sec. 11(a), Chap. 2, Title 11, Bankruptcy Act:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—"

VIII

Section 1908, Code of Civil Procedure, Deering, 1953 Edition, page 741, which reads as follows:

> "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state or of the United States, having jurisdiction to pronounce the judgment or order is as follows:
>
> "1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration or the condition or relation of the person.

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

APPENDIX "B"

Opinions Below

[Civ. No. 24736. Second Dist., Div. One. Mar. 20, 1961.]

THOMAS EISTRAT, Appellant, v. NORTHERN LUMBER COMPANY (a Partnership) et al., Respondents.

[1] **Logs and Timber—Sales—Actions—Evidence.**—In an action involving alleged conversion of lumber, the trial court's finding that the lumber involved was made from logs which were cut by the lumber company prior to plaintiff's attempted revocation of its contract to cut was sustained by evidence where, though defendants had refused to purchase the lumber from the company unless the latter was going to be able to protect them from its creditors, and though the company thereafter filed a petition in bankruptcy, after which the purchase was made, nevertheless defendants did not advise the bankruptcy proceeding and there was no evidence of any collusion between them with reference to the making of the contract

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McK. Dig. References: [1] Logs and Timber, § 11(3); [2] Logs and Timber, § 8; [3] Judgments, § 429; [4] Logs and Timber, § 11(6); [5, 6] Logs and Timber, § 7.

to buy and sell the lumber, where the lumber company's title to the logs and lumber had been upheld in two other proceedings in which the same plaintiff had also been plaintiff, and where plaintiff himself testified that he saw a larger number of board feet of logs lying in the woods on a date two days prior to his attempted revocation of the lumber company's contract.

[2] **Id.—Sales—Validity.** Where a lumber company, after filing a petition in bankruptcy, sold certain lumber, the sale was valid even if the lumber was made from timber felled after the landowner's attempted revocation of the company's contract to cut, since the company was operating under control and supervision within the bankruptcy action.

[3] **Judgments—Res Judicata—Parties or Persons Concluded—Privies.** A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession or purchase.

[4] **Logs and Timber—Sales—Actions—Findings.** In an action involving alleged conversion of lumber which defendants had purchased from a lumber company after plaintiff gave notice of termination of the company's contract to cut timber on his land, the fact that plaintiff had filed, in the company's bankruptcy proceeding, a petition to reclaim his land, together with all logs, timber and lumber thereon, and that the court made order accordingly, did not establish that the attempted termination of the contract was effective, where the last purchase of lumber by defendants from the lumber company was prior to the filing of the petition, and even if the federal court found that all rights of the lumber company under the contract terminated on the date of such notice of termination, such finding was not necessarily binding on defendants, who were not parties to or represented in the bankruptcy proceeding and were not in privity with the bankrupt.

[5] **Id.—Sales—Notice of Termination of Agreement—Effect of Subsequent Claim in Bankruptcy.** Where a landowner, who had entered into an agreement to sell timber from his land, gave notice of termination of the agreement, the agreement was in effect reconfirmed when the landowner thereafter filed a "Proof of Claim" based on it in the purchaser's bankruptcy proceeding, notwithstanding that such claim was subsequently withdrawn.

[6] **Id.—Sales—Notice of Termination of Agreement—Effect of Subsequent Suit.** Where a landowner, having given a lumber company notice of termination of its contract to cut timber on

[2] See Cal.Jur.2d, Logs and Timber, § 11; Am.Jur., Logs and Timber, § 13.

his land, subsequently filed suit against the company and sought termination of the agreement and damages and caused an attachment to issue, that suit nullified the attempted termination.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fletcher Bowron, Judge. Affirmed.

Action for damages for alleged conversion of lumber. Judgment for defendants affirmed.

Thomas Eistrat, in pro. per., for Appellant.

Vincent Scott for Respondents.

FOURT, J.—This is an appeal from a judgment in favor of defendants in an action involving an alleged conversion of certain lumber.

The first cause of action set forth in the complaint is for conversion of 200,000 board feet of lumber for which the plaintiff claims damages of $40,000; the second cause of action is for the value of 200,000 board feet of lumber in possession of the defendants in the amount of $40,000. The Clawsons answered the complaint by a general denial and in effect among other things set forth as affirmative defenses that the lumber was owned by Jones Lumber and Mill Company, hereinafter referred to as Jones, and not by plaintiff; that payment for the logs from which the lumber had been produced had been made; that plaintiff was guilty of laches; that plaintiff was estopped from recovery by his conduct; that the issues involved have been decided against plaintiff in other actions and were res judicata and that plaintiff was estopped to pursue the action by reason of his election to pursue other remedies.

The plaintiff and his wife owned some timberland in Tulare County as community property and he acted for and on behalf of his wife as well as in his own behalf, and the conduct of either was the act and conduct of both.

On August 2, 1948, plaintiff made and entered into a "Timber Sales Agreement" with Jones, wherein plaintiff agreed to sell timber from his land to Jones. The contract provided among other things that the title to the timber passed to Jones when it was severed from the land and became logs, for which Jones was to pay $8.50 per thousand board feet of merchantable timber. Jones went onto the property under the provisions of the agreement, erected a sawmill and between August, 1948, and some time in November, 1948, cut between

125,000 and 500,000 board feet of timber. Said logs were later made into lumber by Jones.

On about October 10, 1948, plaintiff notified Jones that the contract was terminated; however on December 14, 1948, plaintiff filed an action against Jones in Tulare County for damages for an alleged violation of the contract and caused an attachment to be issued.

On June 21, 1949, defendants entered into a purchase and sale contract with Jones for certain lumber. During the negotiations for the contract Jones told defendants that he had some bothersome creditors and defendants refused to proceed further toward making a contract with him unless Jones was going to be able to protect the defendants from his creditors. Jones stated that he would consult with his lawyer about the matter and following his lawyer's advice Jones filed a petition in bankruptcy on June 24, 1949; a restraining order was issued against the creditors of Jones thereby enabling him to operate his sawmill and sell his lumber without interference.

Between June 21, 1949, and August 6, 1949, defendants purchased 161,022 board feet of lumber from Jones, an amount which is less than could be produced from 140,000 board feet of logs. Defendants paid Jones for all of the lumber received by them. Jones paid the plaintiff for the logs from which the lumber sold to defendants was made.

On August 12, 1949, plaintiff's wife filed a verified "Proof of Claim" in the Jones bankruptcy proceedings, wherein she set forth that Jones was liable to her for $8,250, under the written contract of August 2, 1948, and a copy of the "Timber Sales Agreement" was attached to the claim. That claim was subsequently withdrawn.

Plaintiff petitioned the court in the bankruptcy proceeding on September 29, 1949, to reclaim the property, and findings and an order dated October 21, 1950, were made with reference thereto. A petition to review that order was filed by plaintiff and an order was so made and a final judgment therein was made in about October 1951. Judgment in this case was for the defendants.

[1] Appellant now contends that there was no substantial evidence to support the findings of fact and that it was reversible error to deny plaintiff's motion for a new trial.

Appellant complains at great length about the defendants refusing to contract with Jones until they were assured that they would be protected from the creditors of Jones. The fact is that defendants did not advise Jones to go into any

bankruptcy proceeding and there was no evidence of any collusion between Jones and the defendants with reference to the making of the contract to buy and sell the lumber in question. Appellant asserts in effect that the contract was tainted and infected because of the Jones bankruptcy proceedings and that Jones' title to the logs and lumber was faulty. In *Eistrat* v. *Brush Industrial Lumber Co.*, 124 Cal. App.2d 42 [268 P.2d 181], the court said:

". . . on or about August 2, 1948, plaintiff entered into an agreement with Jones Lumber and Mill Company (hereinafter referred to as the vendee) by the terms of which plaintiff gave vendee the right to cut timber on certain property owned by plaintiff." [P. 43.]

"[1] First: *Does the evidence sustain the finding of the trial court 'that plaintiff had no right, title or interest in or to said lumber; that said defendant was the owner of said lumber, and refused and had the right to refuse to deliver said lumber, or any part thereof, to plaintiff'?*

"*Yes.* The evidence discloses that plaintiff entered into a contract giving vendee the right to remove certain lumber from property which he owned, and thereafter vendee did remove the lumber but did so in violation of certain provisions of the contract (this lumber was sold to defendants); that plaintiff knowing of the violation of the provisions of the contract waived any rights against defendants by (1) expressly telling them he would not hold them liable in any way for the alleged breach of contract by vendee (see evidence set forth in the footnote, *supra*; and (2) by instituting the action in Tulare County against vendee and obtaining the levy of a writ of attachment upon defendants for sums which it owed vendee. [2] The rule is established in California that one who obtains an attachment in pursuance of a contractual remedy is estopped to later pursue another remedy predicated upon an alleged tort arising from the same set of facts. (*Estrada* v. *Alvarez*, 38 Cal.2d 386, 391 [6] [240 P.2d 278]; *Steiner* v. *Rowley*, 35 Cal.2d 713, 720 [221 P.2d 9].)

"This rule is here applicable and since defendants purchased the timber from vendee under a valid contract, the above finding of the trial court was sustained by the evidence." [Pp. 44, 45.]

It would appear therefore that the particular matter of which the appellant complains has been litigated and Jones' title was upheld in an action in which the plaintiff here was also the plaintiff.

In another action in which the plaintiff here was also the plaintiff, namely *Eistrat* v. *Western Hardwood Lumber Co.*, 164 Cal.App.2d 374 [330 P.2d 629], it was stated:

"[4] As to whether Jones Company had title to the already cut timber it is clear both from the contract itself and the authorities that timber severed from the soil under the provisions of an agreement, license or permit, before the expiration or revocation thereof, becomes the personal property of the purchaser or licensee. He is vested with the rights incident to ownership of personal property and is entitled to remove it as his own (*Sorenson* v. *Jacobson* (1951), 125 Mont. 148 [232 P.2d 332, 26 A.L.R.2d 1186]; 54 C.J.S. § 29(c), Logs and Logging, pp. 730-731). [5] One who has felled lumber under a purchase agreement retains title to the lumber after the agreement has been revoked. (*Anderson* v. *Moothart*, 198 Ore. 354 [256 P.2d 257].)" [P. 379.]

The evidence in this case is sufficient to support the findings of the trial court to the effect that the lumber purchased by defendants from Jones was made from logs which were felled before the attempted or purported revocation of the "Timber Sales Agreement" on October 10, 1948. The finding reads as follows:

"XII

"That between the 2nd day of August, 1948 and the 10th day of October, 1948, certain timber was felled by Jones Lumber and Mill Company, or its successor Tom Jones, under said Timber Sales Agreement, and that subsequently thereto, approximately 161,000 board feet of lumber was milled from the logs of the timber so felled."

Eistrat himself testified that he saw about 500,000 board feet of logs lying in the woods on October 8 1948.

[2] However even if the timber was felled by Jones after October 10, 1948, and made into lumber sold to defendants between June 21, 1949, and August 6, 1949, the sale of such lumber was valid as Jones was operating under control and supervision within the bankruptcy action.

[3] Plaintiff asserts that the defendants are "privies" with Jones and stand in his shoes. By definition a privy is as follows:

"A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." Citing *Bernhard* v. *Bank of America*, 19 Cal.2d 807, 811 [122 P.2d 892].

[4] The only judgment with which we could be concerned in this case is based upon the petition of plaintiff to reclaim the property filed on September 29, 1949. The petition in that matter sets forth in part:

"'3. At the time of the filing of said petition by said debtor herein, said debtor had in his possession, and the Receiver now has in his possession, the following property belonging to your petitioner:

"'The Northwest Quarter (NW ¼) of Section Twenty-nine (29), Township Twenty-four (24) South, Range thirty-two (32) East, Mount Diablo Base and Meridian, together with the timber and lumber and logs located thereon.'

"And the prayer of said Petition is as follows:

"'WHEREFORE your petitioners pray that Vincent DiGiorgio, said Receiver, be directed to surrender possession to your petitioners of said property, and that your petitioners have such other and further relief as is just.'

"And the Order on Petition for Review recites as follows:

"'II. That the said THOMAS EISTRAT and ELMA EISTRAT are the owners of said real property and all of the logs, timber and lumber thereon and entitled to immediate possession thereof.

"'III. That the Trustee herein forthwith deliver over to said THOMAS EISTRAT and ELMA EISTRAT Possession of said real property and the logs, lumber and timber thereon.'"

It would appear that plaintiff petitioned only for the real property, timber, lumber and logs thereon and the court apparently ordered only that plaintiff was the owner thereof and ordered the receiver to deliver the real property, logs, timber and lumber in his possession to the plaintiff. The last purchase of any lumber by defendants from Jones was on August 6, 1949.

However even assuming the findings in the federal court as claimed by plaintiff, namely, that all rights of Jones in and to his "Timber Sales Agreement" of August 2, 1948, terminated on October 10, 1948, such would not necessarily be binding upon the defendants in this action. The defendants in this action were not parties to the bankruptcy proceedings nor were they in privity with Jones, who was a party thereto. Jones did not represent the legal interests or rights of the defendants in any proceeding, nor did any officer of the bankruptcy court represent the interests of the defendants. The defendants were for all intents and purposes strangers to the federal court proceedings. There could be no mutuality of

estoppel in this case. See *Eistrat* v. *Brush Industrial Lumber Co.*, 124 Cal.App.2d 42 [268 P.2d 181]; *Whitney* v. *City & County of San Francisco*, 52 Cal.App.2d 363 [126 P.2d 367]; *Bernhard* v. *Bank of America*, 19 Cal.2d 807 [122 P.2d 892]; Witkin, California Procedure, volume 3, page 1926.

[5] It must also be remembered that the plaintiff in effect reconfirmed the "Timber Sales Agreement" when Mrs. Eistrat filed the "Proof of Claim" in the bankruptcy proceedings on August 12, 1949, some six days after the last purchase of defendants from Jones. The subsequent withdrawal of the claim only indicates that the plaintiff determined to proceed upon another course.

The record demonstrates that the plaintiff was paid by Jones for the lumber the price agreed upon between them in their contract. Having accepted the full payment under the circumstances, he cannot now collect again from the defendants.

[6] With reference to the defense of estoppel defendants point up that after Jones had cut substantial amounts of timber into logs under the contract with plaintiff, the plaintiff attempted to terminate the agreement as of October 10, 1948, as heretofore set forth, even though the plaintiff had already received payment for a substantial portion of the logs so cut. The plaintiff filed suit against Jones in Tulare County and sought termination of the agreement and damages and caused an attachment to issue. That suit then nullified the attempted termination. See *Eistrat* v. *Brush Industrial Lumber Co.*, 124 Cal.App.2d 42 [268 P.2d 181].

The plaintiff's motion for a new trial was thoroughly considered by the trial court. We have read the proceedings and we think the trial court was proper in denying the motion of the plaintiff.

The judgment is affirmed.

Wood, P. J., and Lillie, J., concurred.